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*ST. LOUIS, JULY 24, 1885.*

## CURRENT EVENTS.

RECENT VERDICTS.—Short, the assassin who attempted to kill Phelan in cold blood, was recently acquitted by a New York jury, in the face of the plainest and most conclusive testimony. Cunningham and Burton, the two alleged dynamiters were recently convicted in England of "treason-felony" on circumstantial evidence so weak, that no fair-minded judge would, on such testimony, send to a jury the case of a tramp indicted for stealing a shilling. A man named Cluverius was recently convicted of murder in the first degree at Richmond, Va., on the charge of killing his cousin, upon evidence so weak that an unprejudiced jury would not, on similar testimony, convict a negro of stealing chickens. Mrs. Yseult Dudley, the crank who attempted to kill O'Donavon Rossa, was recently acquitted by a New York jury, on the ground of insanity, after a farcical trial in which the prosecuting attorney zealously endeavored not to prosecute. She was just as sane, in the sense of being criminally responsible as any man on the jury, and the London *Lancet*, notwithstanding the popular applause which the news of the verdict created in England, had sufficient regard for truth and law to point out that no evidence of a want of criminal responsibility was developed in the case. A man in East Tennessee, deliberately killed another man to avenge some injury to a female relative—we do not remember the particulars, nor are they material,—and a senator of the United States who defended him, so far forgot his duty as a member of the legal profession, as to tell the jury that it is a part of the unwritten law of this country, that a man who slays the seducer of his wife or daughter is guilty of no crime. There is no such law, unless it be among barbarians;—no law which allows one man upon *ex parte* evidence, hearsay or rumor, to accuse another man, to judge him, and to convey to him the first notice of the accusation in the form of capital execution; and which tries his guilt or innocence before a jury for the first time after his lips are sealed in death. Public opinion justly sympathizes with one who avenges a wrong of that nature. But if he avenge it with death it is murder. Every lawyer knows that by the law of the land, it is murder. Every judge will instruct a jury that it is murder; and the jury who acquit, usurp the pardoning power and lay the moral guilt of perjury on their souls. In each of these cases, the verdict reflected popular fear, popular sympathy, or popular prejudice. The jury in the Short case either sympathized with the supposed political objects of the attempted assassination of Phelan, or else were afraid of the secret society to which Short was supposed to belong. In the Cunningham and Burton case, all England was in a state of terror and demanded a victim. In the Cluverius case, the evidence was wholly circumstantial, and left the question utterly in doubt whether the victim had drowned herself or had been drowned by him. But a woman had died and the accused had been criminally intimate with her; and the loose conscience of the jury, voicing public clamor, transformed seduction into murder. Such verdicts tend to produce a growing mistrust of the system of trial by jury. They show that that system is a barbarous system; that the outcome of it is generally a reflection of unreasoning sympathy, passion and prejudice; and that it is as inefficient to protect the innocent against unfounded charges, as to protect society against notorious crime.

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THREE TRIAL RULES.—1. *Rely on Yourself.*—The other side is not so weak as your client supposes. It will not be idle, but quite active. What you expect of breaking down witnesses may be measured by a heavy discount. Men are not caught napping. Witnesses are intelligent, brave, daring, determined. They are generally determined to outwit, out-talk, and out-general lawyers. If you think otherwise you will be willing to trade conclusions before very long in a lawsuit, so that the first rule is: *Rely on the merits of your own evidence rather than the weakness of your adversary.* 2. *A short answer (if a bad one) is best.* If a witness has commit-

ted himself to a theory, or a fact opposed to your side, never allow him to explain his position by further questionings. This will please him too well, and he will ever be ready to strengthen his side. In trying to be precise he will grow intense. In your trying to destroy his force he will swear the harder, for he will feel the necessity for it. You put him on guard, and the jury on guard if you assume to treat his statement as important enough to need such modifying, and more cases are lost than won by dragging out from the other side what should come from your side. 3. *Don't be too sure about it.* If your case is in court as it should be; if all the statutory steps have been taken, and the witnesses are called in the presence of counsel separately, and have told their story in their own way, unbiased by the statements of others, told the facts as a patient would to a physician -then the cases should be rare where a plaintiff fails to recover. But with all these precautions, some will be lacking under oath, and allowance need be made to make up the differences. In criminal cases, the doubt may win while in civil suits, it is often the means of losing. To the very latest moment be guarded and diligent.

J. W. DONOVAN.

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THE LAW AND ORDER LEAGUE.—They have in Boston, and perhaps elsewhere, a society called the Law and Order League, which seems to be engaged principally in the work of prosecuting those who violate the law concerning the sale of intoxicating liquors. The difficulty of organizations of this kind is, that they are too narrow in their views and in the scope of their operation. In fact, they are so narrow that they deserve to be called fanatical. The criminal laws of many portions of the United States are very poorly enforced. The prosecuting attorneys are very often boys just out of the law schools, and arrayed against them are old, adroit, and in many cases not very scrupulous practitioners. Except, therefore, in cases where private prosecutors are able and willing to come forward and fee competent counsel to assist the State's attorney, the State very often proceeds at a very great disadvantage. The result is an administration of criminal justice so uncertain in its results, and attended with such delays as to afford little protection to society. This, the people feel so profoundly, that the swift vengeance of the mob often breaks loose, and outruns the halting, tottering steps of the law. Now this points to the conclusion that a law and order league, to be really useful, ought to concern itself with the prosecution of all violators of the law, instead of narrowing itself down to the prosecution of liquor dealers. But, after all, is it advisable that the prosecution of crime by private agencies should be encouraged? Are not the State and the State's officers the only proper agencies through which to work? The difficulty is in a public opinion sufficiently strong and active to support the State's officers. Their natural disposition is to prosecute. They even prosecute with such an excessive and cruel zeal as to deserve for them the appellation of the "lean dogs of the law." If they refuse to prosecute because local opinion is against them, they ought to be prosecuted for neglect of duty and removed from their office, just as the State's attorney for Saline County, Kansas, was the other day prosecuted by *quo warranto* in the Supreme Court of Kansas, and removed from office for neglect of his official duty in failing to prosecute certain open offenders of the liquor law of that State.

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IS THE LAW BEHIND THE AGE?—Judge Bleckley, of Georgia, thinks it is, and we agree with him. In his report as chairman of the committee on law reform at the last meeting of the Bar Association of that State, he used this language: "In the administration of justice there ought to be correctness, celerity and cheapness. The second alone is the topic of this report. Time is the increasing factor—the growing element of modern life. Progress is the realization, in short time, of what formerly occupied long time. At least this is one form of progress, and that form with which we, of the nineteenth century are in immediate contact—a century that if measured by results in some of the spheres of human activity, might well count for a thousand years. How is it with practical, remedial jurisprudence? Is it up with, or is it behind the age? Compare it with other

business, public or private; with operations of the war department, the navy, the treasury, the post-office, the interior; with commerce, manufactures, banking, transportation, mining, farming; with the venerable and conservative vocations of teaching and preaching; with anything, and what is its relative position? The main bulk of world-work is ahead of it; several branches of that work, for instance, the postal service, general transportation, commerce and manufactures, are so far in advance, that the law seems to crawl whilst they go on wings. Is this relative backwardness a necessary condition, rooted in the nature of things, or is it attributable to deficient energy and enterprise on the part of the legal profession? Can it be possible the law is to become obsolete: that the ages are to outgrow it; and that though sufficing for the past, it is not equal to the demands of the future? Will it be Bradstreeted as a failure? Surely this supposition cannot be entertained. And if not, the conclusion is imminent that either directly or indirectly, we lawyers are responsible for the wide chasm that separates the effective administration of the law from those industries, public and private, with which it ought to be abreast. Is it fit that a body of men so numerous, so cultivated, so capable, should suffer their quota of labor, their distinctive calling, to remain hopelessly behind? Let a noble, manly pride answer in the negative."

## NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW [LEGISLATIVE BILLS]—ACTS TO CONTAIN BUT ONE TITLE AND THAT EXPRESSED IN THE CAPTION.—In *People, ex rel., Thomas, Att'y Gen. v. Goddard*, the Supreme Court of Colorado has recently had a close question before it. The title of an act of the legislature of that State,[1] was, "An act regulating elections and repealing all territorial acts upon the subject." The fourth section of this act read: "Every qualified elector shall be eligible to hold any office for which he is an elector, except as otherwise provided by the constitution." The constitution of Colorado prohibits the passage of bills containing more than one subject, and makes void so much of any act as shall not be expressed in its title; and the question was whether the above section, which does not relate to elections, but to the qualification for public officers, was thereby rendered void. The court held that it was not. Beck, C. J., in giving the opinion of the court, said: "Provisions of this character are usually inserted in constitutions, the object being, as was stated by the Supreme Court of Iowa, to prevent the union in the same act of incongruous matters, and of objects having no connection or no relation.'[2] But Mr. Cooley says the general purpose of these provisions is accomplished when a law has but one general object which is fairly indicated by its title.[3] This learned author further says in the same connection: 'To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible.' Courts and law writers have said that the generality of the title of a bill is no objection to it, and that it is not required that the body of a bill shall be a repetition of its title. The lamented Thatcher, when chief justice of this court, in commenting upon the constitutional provision referred to, used the following language, which has since been accepted as the true interpretation of the provision: 'That under our constitution so much of any act as is not directly germane to the subject expressed in the title is without force: that the provision, instead of being only a rule of the general assembly to regulate their procedure, is a mandatory declaration of an essential condition to the validity of legislative enactment.'[4] If subjects diverse in their natures, having no necessary connection with each other, be joined together in a bill, or subjects be inserted of which the title gives no intimation, it is an imposition upon the legislature and the public as well, and constitutes the very evil against which the constitution sought to guard. But as we said in Golden Canal Co. v. Bright:[5] 'This

[1] Colo. Act of March 8, 1877.

[2] State v. County Judge, 2 Iowa, 280.

[3] Cooley, Const. Lim. 144.

[4] Central & G. R. Co. v. People, 5 Colo. 41.

[5] 6 Pac. Rep. 142,

constitutional inhibition must have a reasonable construction. It is enough if the bill treats of but one general object, and that object is expressed in the title. To require that each subdivision of the subject, each and every of the end and means necessary or convenient for the accomplishment of the object, must be specially mentioned in the title, would greatly impede and embarrass legislation.' The act in question relates to the general subject of elections, and to say that the qualifications of those to be elected, as well as the qualifications of the electors, is not germane to the subject, might produce disastrous consequences. If such a ruling should be made it might serve as a precedent for annulling the act in other essential particulars certainly not more germane to the title than this one. The act has been in force for eight years, and valuable rights have accrued under it." It ought to be said in justice to the courts, that other courts, proceeding upon the same argument *ab inconvenienti*, have felt bound to give to similar constitutional provisions the same loose interpretation. An able review of the cases was made by Judge Rose, of Arkansas, in a paper read before the American Bar Association in 1882.[6] Verily, it may be said of many statutes—to borrow a quotation there used—that

> * * * * * * * Titles
> Hang loose about them like giant robes
> Upon a dwarfish thief."
> —*Macbeth*, Act 5, Scene 2.

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MUNICIPAL CORPORATION. [DAMAGES] — DAMAGES TO ABUTTING PROPERTY OWNERS FROM ERECTION OF BRIDGE.—In *Cohen v. Cleveland*,[7] the Supreme Court of Ohio announce that they never will change the rule in McComb v. Akron,[8] and we trust they never will. The city of Cleveland, proceeding under a valid statutory authorization and without negligence, erected a bridge in front of the plaintiff's house and lot, whereby it was damaged in about one-half its value. It was held that the city must pay him the damages which it had inflicted, although he had not proceeded to have them assessed under a statute.[9] the reason why they held that he need not proceed under the statute was that, as there was an intervening strip of roadway between his front line and the bridge, he was not the owner of lots "bounding or abutting upon the proposed improvement," within the meaning of statute. Upon the main question, the obligation of a municipal corporation to make compensation to a property owner for consequential damages of this nature inflicted upon him, the court, speaking through Okey, J., said: "These acts [authorizing the construction of the bridge] are supplementary to the municipal code; no objection which has been urged against their validity in this case is tenable; and in our judgment those acts, in connection with the municipal code, contain ample power for the erection of such structure. Hence, the viaduct cannot be, in contemplation of law, a nuisance, but is a lawful structure; and there is no complaint that there was negligence, malice or bad faith which caused injury to the plaintiff. But the right of Cohen to damages is not determined adversely to him by these facts. He is not entitled to compensation under the letter of the constitution,[10] but may be entitled to such compensation in analogy to that provision. Injuries resulting from the change of established grades in streets, though made in accordance with the statute, and without negligence or malice, and other injuries of a kindred character, have been held to afford ground for the recovery of damages against municipal corporations.[11] This court has, however, constantly acknowledged that McComb v. Akron, and cases following it, is a departure from the current of authority elsewhere; and, although these cases have not found favor with the judges delivering the opinions in Ratcliff v. Brooklyn,[12] Hill v. Boston,[13] Alexander v. Milwaukee,[14] Trans-

[6] 17 Am. Law Rev. 495.
[7] 13 Weekly Law Bulletin, 555.
[8] 15 Ohio, 479; s. c. *sub. nom.* Akron v. McComb, 18 Ch. 229; s. c. 51 Am. Dec. 453.
[9] R. S. Ohio, § 2315, (Municipal Code of Ohio, § 564.)
[10] Art. 1 § 19.
[11] Rhodes v. Cleveland, 10 Ohio 159; McComb v. Akron, 15 Ohio, 479; s. c. *sub. nom.* Akron v. McComb, 18 Ohio 229; s. c. 51 Am. Dec. 453; Crawford v. Delaware, 7 Ohio St. 459; Youngstown v. Moore, 30 Ohio St. 133; Keating v. Cincinnati, 38 Ohio St. 141. And see Little Miami R. Co. v. Naylor, 2 Ohio St. 235; Street Railway v. Cumminsville, 14 Ohio St. 523; Richard v. Cincinnati, 31 Ohio St. 506; Story v. N. Y. Elevated R. Co., 90 N. Y. 122.
[12] 4 N. Y. 95; s. c. 53 Am. Dec. 357, 366, note.
[13] 122 Mass. 344, 378.
[14] 16 Wis. 247, 256.

portation Co. v. Chicago, [15] we are entirely content with the doctrine, and would not change it if we could. But the justice of the Ohio rule, the firmness with which it has been adhered to for nearly half a century, and the manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to inquire whether McComb v. Akron was properly decided. In other States, the same rule is in part or wholly adopted by constitutional or statutory provision." This is good, wholesome doctrine, and contrasts favorably with the barbarous rule formulated in British Cast Plate Man. Co. v. Meredith,[16] and echoed in such decisions as Hill v. Boston,[17] and Transportation Co. v. Chicago,[18] a doctrine which is twin-born with the doctrine that the king can do no wrong; a doctrine which transforms the state from the guardian which protects, into the juggernaut which destroys; a doctrine which never could have been transplanted into American soil, except by judges whose technical learning outran their sense of justice.

[15] 99 U. S. 635.
[16] 4 T. R. 794.
[17] 122 Mass. 344.
[18] 99 U. S. 635.

## PROCEEDINGS IN REM AS AFFECTED BY DEATH OF PARTY.

Is a libel *in rem* against a vessel or other property, in the admiralty court, converted into a proceeding *in personam* by the giving of a claimants' bond for all the property libeled, and appearance and defense by the claimant?

This is a doubtful question, so far as light is thrown upon it in the American adjudications; but the authorities tend toward a negative answer to the question. The proceedings, commenced by the libel and seizure of the vessel or other property, were, in form, *in rem*. The remedies allowed upon the claimants' bond, against him and his sureties, are in form, *in personam*. It does not necessarily follow, however, that the personal features of these remedies are evidence of a change in the character of the proceeding.

The question stated may be considered as fairly arising whenever, after the intervention of a claimant in a proceeding *in rem*, he or one of his sureties shall die pending the hearing of the cause. What notice need be taken of such death? May the cause still proceed to a decree, and may such decree be properly rendered, as to the survivors, without noticing the death or awaiting any intervention or the part of the representatives of the decedent?

These questions were presented in the early case of Penhallow v. Doane.[1] During the Revolutionary war, a vessel had been captured by another, cruising under congressional authority, and had been libeled as prize in a colonial court, and after Doane had intervened as claimant, she had been condemned as prize. Doane prosecuted an appeal to the appellate court, in which in 1783, the sentence of the lower court was reversed and the property was ordered to be restored; but before this judgment was rendered in favor of Doane, he was in fact dead. After the creation of the Federal Courts, Doane's representatives brought suit upon the judgment, when, it was objected that the decree in Doanes' favor was void because be was then dead, and therefore his claim had abated. Elaborate opinions were given in the case by several of the justices of the Supreme Court, three of whom agreed that the death of Doane did not abate the proceedings in the suit *in rem*. Two of these were of the further opinion that inasmuch as the sentence of a court of admiralty binds all the world, because all the world are parties to the proceeding, it was not necessary to take any notice of the death of the claimant Doane; and the third took the view that the decree, though voidable, was valid until reversed in a regular proceeding. The representatives of Doane were therefore allowed a recovery on the judgment pronounced in 1783.

In the James A. Wright,[2] substantially the same questions arose, though in a different form, inasmuch as the decree in this case had been pronounced after the death of the claimant, but against him. The case was a libel *in rem*, against a vessel, for tort. The claimant intervened and defended the suit in the usual manner, giving bond for the property, with two sureties. He was dead at the time of the trial, but this fact was not made known

[1] 3 Dallas, 54.
[2] 10 Blatch., 160.

to the court. On the hearing in the District Court,[3] a decree was rendered against the vessel, and an appeal was taken to the circuit court, when on a trial *de novo*, the fact of the death of the claimant was made known, and urged as ground for reversal. The circuit court, by Woodruff, C. J., followed "the declaration of the Supreme Court, in Penhallow v. Doane, that in proceedings *in rem*, in admiralty, the death of a claimant does not abate the suit, nor render a subsequent decree therein erroneous;" and said, "All the world must take notice, at their peril, that condemnation is sought; all having an interest may intervene, and if, by death or otherwise, an interest is transmitted or devolved upon persons not previously entitled to intervene, it is for them to protect their own interest, by applying to the court for that purpose, and the libellant should not be affected by their neglect."

The question was also illustrated in the further rulings of the court in the same case. Having found the merits of the case in favor of the libellants, the court intimated that the decree of the district court, though good as to the sureties, was bad as to the deceased claimant, and said, "Had the attention of the district court been called to the fact that Dakin, one of the bondsmen on whose stipulation for value the vessel was released, had died, that court would, probably, have ordered summary judgment against the survivors only."

The case of the C. F. Ackerman[4] presents a variation of the question. A decree having been rendered against the libelled vessel, which was not paid by the claimants, the libellants moved for summary judgment against one of the two stipulators in the claimant's bond. To this the stipulator interposed two objections; first, that the libellants had not exhausted their remedies against the claimant, and second, that the other stipulator was dead. The court followed to its logical conclusions the principle that a proceeding *in rem* is notice to all the world, and held that the libellants' right to proceed against the stipulators became perfect upon the rendition of the decree, that this right was not affected by the solvency or insolvency of the claimant, and that each stipulator was bound to respond to the terms of his stipulation, no matter whether others bound with him were living or dead; so judgment was allowed against the survivor.

These decisions would seem to be legitimate deductions from the statutory form of bond prescribed for execution by claimants in admiralty proceedings *in rem*, the required condition of which is "to answer the decree of the court in such cause."[5] It is probable that the admiralty courts would hold, if necessary, that this condition was by the statute made a part of every admiralty stipulation, even though the document itself might omit it in whole or in part. At all events, bonds given in admiralty proceedings are construed by the courts according to the settled rules governing admiralty stipulations, rather than according to common-law rules, even when informally drawn.[6]

Mr. Conkling, in the form recommended by him for claimants' bond in such cases, inserts in the condition, the words, "shall well and truly abide and answer the decree of the said court in the aforesaid cause;"[7] and says that he deems it "expedient to adhere to the words of the act." In the form of stipulation recommended by this author for like cases, the stipulators bind themselves that the claimant "shall abide and answer the decree of the said court in the aforesaid cause; and unless he shall do so, they do hereby severally consent that execution shall issue forth against them.[8] This conforms to the idea of a stipulation under the civil law, the *judicatum solvere*, by which the stipulators bound themselves "to surrender the thing or pay its value,"[9] or in other words, "to secure to the actor the payment of the judgment."[10] The effect of the corresponding stipulation in the English admiralty practice is that the stipulators consent, in case of default in the performance of the condition, that admiralty process shall issue against them.[11] That there is no practical difference, under the

[3] 3 Ben., 248.

[4] 14 Blatch., 360.

[5] Rev. Stats. U. S., § 941.

[6] Save v. Townsend, 1 Ware, 286. See this case for a learned dissertation on the general subject of stipulations under the civil and admiralty law.

[7] 2 Conklings' admiralty, 583.

[8] Id. 582.

[9] 2 Conk. Adm. 83.

[10] Save v. Townsend, 1 Ware, at p. 308.

[11] 2 Brown's Civil and Adm. Law, 400.

American admiralty system, between a bond and a stipulation in such cases, is evident from the statute, which authorizes either to be given, indifferently, by the claimant, and provides as to either that "judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause." [12] Whether it be a bond or a stipulation, therefore, which the claimant has given, the incidents which attach to it remain those peculiar to a proceeding *in rem*, and the liability of the sureties is commensurate with all the possible contingencies of such a proceeding.

It is true that the admiralty courts hold that the bond or stipulation given by the claimant becomes a substitute for the *res*,[13] to such an extent even that the court will refuse an application for the re-seizure of the *res*.[14] It is true also, that it is held that the judgment against the claimant and his sureties, when once rendered, becomes a judgment *in personam*, which has all the attributes of any other judgment *in personam*, and may be made the subject of an action in any court having jurisdiction of the defendant.[15] But until such judgment is obtained, it would seem that the case is still, in contemplation of the admiralty jurisprudence, proceeding as a case *in rem*, for it is expressly held that as a feature of the substitution of the stipulation for the *res* which was libelled, "the stipulators are liable to the exercise of all those authorities on the part of the court, which it could properly exercise if the thing itself were still in its custody," which is according to "the known course of the admiralty." [16]

From these considerations it appears that no change, even partial, is made in the character of the proceeding, as one *in rem*, by the release of the *res* on a claimant's bond; it remains purely a proceeding *in rem*, though it may terminate by a judgment *in personam*; and the summary remedy of either party will not be embarrassed by the death of a party or any other incident such as might cause "the law's delay" to protract an ordinary suit at law.

J. O. P.

[12] The Blanche Page, 16 Blatch. 1. In this case, it will be observed that one of the sureties on the claimant's bond had died pending the suit, but no attention was paid to this fact by the court.

[13] Rev. Stats. U. S., § 941.

[14] The Palmyra, 12 Wheat. 1; The Union, 4 Blatch. 90. Waples on Pro. *in Rem*, § 81; Roberts on Admiralty, 434.

[15] The Union, 4 Blatch. 90: The White Squall, Id. 103.

[16] The Palmyra, 12 Wheat, 1, (per Story J.)

## APPLICATION FOR INJUNCTION TO RESTRAIN THE ORGANIZATION OF A CORPORATION.

### LEHIGH VALLEY COAL CO. v. HAMBLEN.*

*Circuit Court U. S., Northern District Illinois, March 9, 1885,*

The Circuit Court of the United States will not grant an injunction at the suit of a foreign corporation to restrain the organization of a corporation having the same name as that of such foreign corporation.

In Equity.

*F. Ullmann*, for complainant; *Beck & Roberts*, for defendants.

GRESHAM, J., delivered the opinion of the court:

The complainant company was organized under the laws of Pennsylvania, in 1875, for the purpose of mining anthracite coal in that State, and selling the same there and elsewhere. It owns valuable coal mines in Pennsylvania, and does a large and lucrative business. For a number of years it has had an extensive and profitable business in the west and north-west; and for convenience in the management of that business it has maintained an agency at Chicago, where it owns real estate, including a dock worth $200,000, and has on hand coal worth $400,000. The defendants in this suit, wishing to create a corporation in Illinois bearing the same name as the complainant, to carry on the same business, filed their articles of association with the secretary of State on the 26th of December, 1884, under the general laws of Illinois authorizing the creation of corporations. The secretary of State thereupon issued to the defendants a license as commissioners to open books for subscription to the capital stock of the new corporation, to be known as the Lehigh Valley Coal Company. This suit was brought to prevent the defendants, by injunction, from receiving stock subscriptions, or taking any other steps necessary to be taken under the statute, in the creation of the new corporation.

The object of the defendants in causing an Illinois corporation to be created, bearing the same name as the complainant company, is obvious. They hope, by this means, to secure the benefit of part, at least, of the patronage which the complainant has acquired. Unwilling to engage in open, manly competition with the complainant and others carrying on the same business, the de-

*S. C., 23 Fed. Rep. 225.

fendants resort to a trick or scheme whereby they hope to deceive the public, and obtain an unfair advantage of the complainant. Such conduct might be fairly characterized more harshly; and it is with extreme reluctance that I deny the complainant the relief prayed for.

The complainant is a foreign corporation, and it is only by comity that it is doing business in Illinois at all. The State can say to it any day, "Go!" and it must go. That being so, I do not see that the complainant has a legal right to say a corporation shall not be created in Illinois bearing its (the complainant's) name. If the State of Illinois may create a corporation bearing the same name as the complainant,—and it certainly can,—this court has no right by injunction to prevent anything from being done under the State law which is necessary in the creation of such a corporation. The commissioners perform a function under the laws of the State in the formation of the corporation. If they are not offices of the State they are instrumentalities employed by the State. If they can be enjoined from receiving stock subscriptions under the license issued to them by the secretary of State, I do not see why the latter might not be enjoined from issuing a license, or doing anything else under the State statute. The general law authorizing the secretary of State to issue a license to commissioners to receive stock subscriptions, provides that no license shall be be issued to two or more companies having the same name. Before bringing this suit, the complainant should have brought to the attention of the secretary of State the matters alleged in the bill. He might, on a proper application, have revoked the license to the defendants, unless they adopted another name for their company. I do not think this court can interfere by injunction, at the instance of a foreign corporation, and prevent any necessary step from being taken under the statute of this State in the creation of a corporation.

I do not say what may be done if the defendants succeed in creating their corporation bearing the complainant's name, and a suit shall be brought by the complainant to prevent individuals claiming to be officers or managers of such corporation from interfering with the complainant's business, as already stated.

The temporary injunction heretofore granted is dissolved, and the bill is dismissed.

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## CRIMINAL LAW — SELF-DEFENSE—CHARACTER OF DECEASED—DYING DECLARATION.

### BOYLE v. STATE.

*Supreme Court of Indiana, September, 1884.*

**In a trial of murder the defense being that the homicide was committed in self-defense, the defendant may show that his acquaintance with deceased was a brief association as criminals; it is error to refuse to permit him to show that deceased told defendant on the night before that he had previously committed two felonious assaults, and that he preferred a knife to a pistol for such work, as it was more effective.**

**A dying statement that victim knew of no reason for the assault, is not a statement of opinion, and is admissible.**

NIBLACK, J., delivered the opinion of the court:

This was a prosecution for murder under § 1904 of the Revised Statutes of 1881. The indictment was in six counts. The first count charged the appellant William Boyle, with having on the 15th day of March, 1884, at the County of Allen, in this State, unlawfully, purposely, feloniously, and with premeditated malice, killed and murdered one Daniel Casey, by then and there shooting him to death with a pistol. A jury found the defendant guilty of murder in the first degree, as charged above in the first count of the indictment, and fixed his punishment at death. After considering and overruling a motion for a new trial, the court pronounced judgment upon the verdict, and sentenced the defendant to be hung on Wednesday, the first day of October, 1884.

A freight train running from Crestline, in the State of Ohio, to Fort Wayne, in this State, stopped at Monroeville, in Allen County, early in the morning of the 15th day of March, 1884. One of the brakemen on the train found the defendant and Casey together in a box car, in which they had been riding without authority from the conductor. The brakeman ordered both of them to leave the car, which they did without unnecessary delay. After coming out of the car the defendant and Casey fell into a quarrel about something, to which no one else gave attention. They proceeded together along one of the streets of Monroeville for a short distance, when they came to a stop a few feet apart. At this point the defendant, being seemingly very angry and much excited, declared his intention to kill Casey, and, suddenly drawing a revolving pistol from one of his pockets, fired upon him, inflicting a mortal wound, from which death ensued two and a half days thereafter. The defendant, testifying as a witness in his own behalf, stated that he had first met Casey at Bucyrus, Ohio, on the 12th day of March, three days before reaching Mooreville; that they immediately became acquainted and confidential; that on the afternoon of that day they went to a town fifteen miles north of Bucyrus, the name of which he did not remember, where, during the ensuing night, they burglariously entered some stores, by which means they obtained a large lot of knives, some razors and a considerable amount of jewelry, all of which they concealed about their persons; that they proceeded thence, partly on foot and partly by railroad, to Lima, Ohio, where, on the night of the 14th of March, they got into the freight train upon which they were found next morning at Monroeville; that, during the night,

they drank considerable quantities of intoxicating liquor; that when the brakeman ordered them out of the box car he, the defendant, offered him, the brakemen, one of the stolen knives to conciliate him; that Casey, on that account, became very angry and abusive to him, the defendant, saying, amongst other things, that, if he, defendant, ever made so bad a break as that again, he, Casey, would kill him; that it was in this way that the quarrel ending in the shooting began; that at the time he, defendant, shot Casey, the latter was,and had been, striking at him with a knife; that, in consequence, the shooting was in self defense.

Counsel for the defendant thereupon offered to prove by him that, while on the freight train between Lima and Monroeville, Casey told him, the defendant, that he Casey, had shot one Fontaine, City Marshal, of Springfield, Illinois, while the latter was trying to arrest him for a robbery; that he had also stabbed a man at Paris, in the State of Illinois, for which he was sent to the State's prison at Joliet, and that he, Casey, had quit carrying a pistol, as he had ascertained that a knife did its work much more quietly and with better effect. But the prosecuting attorney objecting, the court refused to permit the defendant to make the proposed proof, upon the ground that evidence of particular acts of criminal misconduct, even by his own admissions, was not admissible to establish Casey's bad character as a violent and dangerous man, or in mitigation in any other respect; and that refusal has been made one of the principle questions upon this appeal.

In the case of Dukes v. The State, 11 Ind. 557, this court said: "As a general rule it is the character of the living, the defendant on trial for the commission of crime, and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justify them in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case, where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." In the later case of Fahnestock v. The State, 23 Ind. 231, this court further said: "If the deceased was in the habit of becoming intoxicated, and when in that condition was quarrelsome and violent, and that fact was known to the defendant, and if it is further claimed that the deceased was intoxicated at the time the defendant met him in the saloon, a short time before his death, and that the defendant's conduct on that occasion is claimed to have been influenced by a knowledge of the alleged violent habits of the deceased when so intoxicated, the question of such habits or disposition would seem to be one of fact rather than of general character."

Wharton in his work on Criminal Law states the rule to be "that, whenever it is shown that a person is himself attacked, it is admissible for him to put in evidence whatever could show such attack to be felonious. He may thus prove that the person assailing him had with him burglar's instruments. He may prove him to be armed with deadly weapons. He may prove him to have been lurking in the neighborhood on other plans of violence. He is entitled to reason with himself in this way: 'This man comes to my house masked, or with his face blacked, he is the same who has been prowling about in the neighborhood, and is connected with other felonious plans; I have grounds to conclude that such is his object now.' And if so, he is entitled to say, 'This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion, than that his present attack is felonious. And if such could be a legitimate reason for him to expect and defend himself against a desperate conflict, the facts are such as he is entitled to avail himself of on trial. He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had ground to believe such attack to be felonious." Vol. 1, § 641. The case of Horbach v. The State, 43 Tex. 242, is a well considered case, and gives an able exposition of the law of self-defense. The doctrine it announced is well supported by the authorities cited by it, as well as by the modern current of judicial opinion. It holds in brief that the habit of the deceased of carrying weapons, and his character for violent and passionate conduct, as well as other peculiarities constituting him a dangerous adversary, may, when the proper foundation is laid, be proven as distinct facts, and as part of the *res gestæ*, when such facts which might be reasonably supposed to have had an influence upon the defendant's mind in inducing the belief either that his life was in danger, or that some great bodily harm was likely to result to him. This case impresses us as being not only well supported by authority, but, as being also in accord with the principles of justice and of sound morality. It is cited and commented upon approvingly in a late edition of Greenleaf on Evidence. See vol. 3, 14th ed., §§ 27 and 28, and notes. As in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances, and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances as a defense in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice, in all cases of homicide, and would, in many cases, operate as a serious abridgement of the law of self-defense. When properly construed, the rule recognized by the case of Horback v The

State, *supra*, simply permits all the facts and assumptions upon which a defendant acted, under a claim of self-defense, in taking the life of his adversary, to be proved at the trial, and, as thus construed, we know of no rule more in accordance with the principles of justice.

In the light of the authorities cited, and of our deductions from the general principles enunciated by them, we can only come to one conclusion, and that is, that the court erred in excluding the proposed testimony of the appellant, as to the communications made to him by Casey concerning himself, during the night preceding the homicide, and that for that error the judgment will have to be reversed.

One question remains which ought to be ruled upon at the present hearing, to relieve the embarrassment which might otherwise result when the cause shall be again tried. The dying declaration of Casey, which had been reduced to writing, was, after satisfactory preliminary proof, read in evidence by the prosecuting attorney, as follows: "Dying declaration of Daniel Casey, taken at Mooreville, Allen County, Indiana, on the 16th day of March, 1884. Q. What is your name and residence? A. Daniel Casey, Norwich, Connecticut. Q. Have you given up all hope of life? A. I have, of course. Q. Is this declaration which you now make, free from all malice? A. Yes, it is; I forgive him. Q. What is the name of the man who shot you? A. I don't know his name. Q. Where were you when he shot you? A. On the corner of Railroad and Empire streets, in the town of Monroeville, Allen county, Indiana. Q. Was the man whom you identified on the 15th of March in the presence of the marshal of Fort Wayne, J. B. Neezer, Dr. C. A. Seiter and others, the man who shot you? A. Yes, sir; that was the man who shot me. Q. What reason, if any, had the man you have so identified for shooting you? A. Not any that I know of. He said he would shoot my d——d heart out. Q. What were you doing at the time the shooting took place?

his
DANIEL X CASEY."
mark.

It was objected that this declaration was inadmissible in evidence, first, because it was in the form of a deposition; secondly, because the answer to the question, "What reason, if any, had the man for shooting you?" was a mere expression of an opinion by Casey, in disregard of the inhibition imposed by the case of Burns v. The State, 43 Ind. 311; Thirdly, because it was incomplete by reason of the failure of Casey to answer the last question addressed to him. In the first place, a dying declaration may be made in answer to questions addressed to the dying man, and reduced to writing. 1 Greenlf. Ev., § 159 and note; Commonwealth v. Haney, 127 Mass. 455; State v. Martin, 30 Wis. 216. In the next place, the words "what reason," referred to in the second objection, were, in the connection in which they were used, synonymous with the phrase "what cause," and plainly had reference to facts within Casey's knowledge, and not to opinions merely which he might have entertained. Casey's answer, "not any that I know of," was more in the nature of the denial of a fact than the expression of an opinion. In the case of Wroe v. The State, 20 Ohio St. 460, the court held that "there is no valid objection to the admission of the evidence of Smith Davison as to the dying declarations of the deceased. The declaration of the deceased, in speaking of the fatal wound, that "it was done without any provocation on his part," is objected to as mere matter of opinion. Whether there was provocation or not, is a fact, not stated, it is true, in the most elementary form of which susceptible, but sufficiently so to be admissible as evidence."

The conclusion reached in that case is sustained in principle by the cases of Rex v. Scaife, 1 Moody & Rob. 551, and Roberts v. The State, 5 Texas Appeals, 141; and the precedent it affords may, as we believe, be safely followed, in its fairly analogous application to the question now before us. See also Whart. Crim. Law, § 294. In the third place, the declaration was complete as to the answers to all questions which it purported to answer, and in that sense it was not fragmentary, within the meaning of the case of The State v. Patterson, 45 Vt. 308. Besides, the failure of Casey to answer the last question was sufficiently explained by his attending physician. In our opinion, therefore, the dying declarations of Casey were properly admitted in evidence. The judgment is reversed, and the cause remanded for a new trial.

ZOLLARS, J., delivered a dissenting opinion on the point relating to dying declarations.

NOTE.—The above case is an important one in the law of self-defense; it goes beyond the line marked by the authorities, but we think the ruling of the court consistent with principle. It is now well settled in trials for homicide or assault to kill, where the defendant justifies on the ground of self-defense, that it is competent to show the character of the deceased or assailant for violence, quarrelsomeness, vindictiveness, treachery, his physical strength or habit of carrying weapons. State v. Nett, 50 Wis. 524; Abbott v. People, 86 N. Y. 470; Fitzhugh v. State, 77 Tenn. 258; Alexander v. Commonwealth, 105 Pa. St. 1; State v. Graham, 61 Iowa, 608; DeArmen v. State, 71 Ala. 351; State v. Elkins, 63 Mo. 159; Commonwealth v. Barnacle, 134 Mass. 216, overruling previous authorities and re-establishing the rule in Selfridge's Case; Williams v. State, 14 Tex. App. 102: Turpin v. State, 55 Md. 462; State v. Pearce. 15 Nev. 188; People v. Iams, 57 Cal. 115; Jones v. People, 6 Col. 452; State v. Smith, 12 Rich. (S. C.) 430; Roberts v. State, 68 Ala. 156.

But the cases lay down the rule that it is not admissible to show specific acts of violence committed by the deceased upon third persons, in no wise connected with the defendant; on the ground that such matter is too remote, and, if the proof were admitted, so also would repelling evidence, and the side issues thus raised would be as numerous as the offenses imputed to the deceased. Alexander v. Commonwealth, 105 Pa. St. 1; Dupsee v. State, 33 Ala. 380; McKinna v.

People, 13 Hun, 580; Fitzhugh v. State, 77 Tenn. 258; State v. Elkins, 63 Mo. 165; Thomas v. People, 67 N. Y. 218. Thus in Alexander's case the defense offered to prove a "series of five acts of violence" known to defendant at the time of the homicide; but it was held inadmissible. If the deceased's character, like that of a witness who is sought to be impeached, were the thing to be proved, then undoubtedly specific acts would not be admissible; but the thing to be proved is, did the defendant believe and have reasonable ground for believing in the imminence of danger from violence at the hands of the deceased. For this purpose the previous conduct of the deceased, known to the defendant, of a nature tending to indicate a violent, vindictive or quarrelsome disposition, would be admissible under the ruling in Boyle's Case, even though specific acts, and we think properly admissible. Previous threats made by deceased are specific acts, yet they are receivable upon two grounds: For the purpose of determining who was the aggressor, when doubtful, or to give color and meaning to the deceased's conduct; and also, when communicated to the defendant, to show that the threats, together with the other circumstances, operated to excite reasonable fears, in the mind of defendant of the violent purpose of the deceased. People v. Tomkin, 62 Cal. 468; State v. Elkins, 63 Mo. 159; Keener v. State, 18 Ga. 194; Cases on Self-Defense, Harrigan & Thompson, 238, *et seq;* State v. Turpin, 77 N. C. 473. When a threat has been communicated to the defendant as having been made by deceased, its admissibility does not depend upon the truth of the communication, but on the effect it might produce on the mind of the defendant, and therefore such evidence is not hearsay. Carico v. Commonwealth, 7 Bush. 124; Logan v. State, 17 Tex. App. Crim. Cas. 59; State v. Harris, 76 Mo. 361; 1 Greenlf. Ev., §§ 100, 101. It would seem, therefore, that the question is not whether the deceased had actually threatened the defendant,nor whether he had acquired a character for violence, nor whether he was really guilty of violence in the specific instances, but the fact to be proved is this, did he from his knowledge of the deceased have reason to construe the overt act of the deceased as indicative of an intention then and there to do him violence? 1 Greenlf. Ev., §§ 100, 101; Russell v. State, 11 Tex. Crim. Cas. 288; Munday v. Commonwealth, 81 Ky. 239; State v. Harris, 76 Mo. 361; State v. Johnson, 76 Mo. 121; State v. Eaton, 75 Mo. 592; Whart. Cr. Law, § 641.

The occasion requires a speedy conclusion; that conclusion is materially influenced by his knowledge of the previous conduct of the deceased; doubtless the specific acts sought to be shown should be of a character calculated to indicate a disposition for violence. But it is illogical to hold that though such knowledge was calculated to and did materially influence the defendant in reaching his conclusion, yet they cannot be used by the jury in ascertaining whether the defendant's conclusion was justifiable. The law is now well settled that if, at the time of the killing, the conduct of the deceased was such as to create in the mind of the defendant a reasonable apprehension of death or serious bodily harm, the defendant will not be responsible if those appearances should turn out to have been false. Smith v. State, 15 Tex. App. Crim. Cas. 338. Nichols v. Winfrey, 79 Mo. 544. For the danger need not be real or actual; that it was apparent was sufficient. Munday v. Commonwealth, 81 Ky. 239; Holloway v. Commonwealth, 11 Bush. 344; State v. Johnson, 76 Mo. 121; State v. Eaton, 75 Mo. 592; Horr & Thomp. Cases on Self-Defense, p. 4, 18, *et seq.*

The defendant is entitled to lay before the jury all the circumstances and grounds of fear on which he acted, and hence it is that previous affrays, difficulties and threats made against him by deceased are admissible. Russell v. State, 11 Tex. App. Crim. Cas. 288; Horr. & Thomp. Cases on Self-defense, p. 416. It is generally laid down that evidence of deceased's character for violenee is not admissible unless known to the defendant; Griscom v. State, 8 Tex. App. Crim. Cas. 386; but it may be questioned whether this is true under all circumstances. It is held that uncommunicated threats may be given in evidence, for the purpose of determining the aggressor, and to illustrate the motives and conduct of the deceased. State v. Elkins, 63 Mo. 159. Evidence of character is used sometimes for the same purpose. State v. Turpin, 77 N. C. 473; Harback v. State, 43 Tex. 248; DeArman v. State, 71 Ala. 352. The character of the deceased as a violent, dangerous, overbearing or turbulent man, "is always admissible" say the Supreme Court of Alabama, "where uncommunicated threats are received," and for the like purpose of illustrating the circumstances of the killing and of qualifying, explaining and giving point to the conduct of the deceased at the time of the killing. Roberts v. State, 68 Ala. 165. But evidence of character, like previous threats, will not be admissible, unless there is some evidence to show that the defendant was acting in self-defense, State v. Turpin, 77 N. C. 473. The general rule is that some overt act on the part of the deceased must first be shown. State v. Jackson, 33 La. Ann. 1087; People v. Stock, 1 Idaho T. 218; State v. Pearce, 15 Nev. 188; Abbott v. People, 86 N. Y. 470; McNeone v. People, 6 Col. 346; Cresswell v. State, 14 Tex. App. Crim. Cas. 1: DeArman v. State, 71 Ala. 351. Evidence of deceased's character for peace is not admissible until attacked, Graves v. State, 14 Tex. App. Crim. Cas. 113; but such evidence is admissible when the defendant seeks to to justify on the ground of threats. Russell v. State, 11 Tex. App. 288. Where the defendant introduces evidence respecting deceased's character, it will be proper for the State to produce evidence to sustain it. People v. Iains, 57 Cal. 115; but where the State thus attempts to rebut defendant's evidence, defendant may show the record of conviction of deceased for manslaughter. Brunt v. State, 12 Tex. App. 521; and the defendant may on cross-examination of State's witness as to deceased's character, enquire whether witness has not heard of certain enumerated acts of violence on the part of deceased. DeArmen v. State, 71 Ala. 351.

GIDEON D. BANTZ.

## DISBARMENT OF ATTORNEYS.

### PEOPLE *EX REL.* WHITTEMORE v. RYALLS.*

*Supreme Court of Colorado, May 29, 1885.*

ATTORNEY—[*Disbarment*]—*Wrongfully Retaining Client's Money.*—An attorney stricken from the rolls for wrongfully retaining money belonging to client, although he had paid it over after proceedings commenced against him.

Proceeding for disbarment.

*Theo. H. Thomas*, Atty. Gen., and *Horace G. Benson*, for the people.

PER CURIAM.

This proceeding is instituted under section 74 of the General Statutes. The substance of this

*S. C., 7 Pac. Rep. 290.

statute, briefly stated, is that whenever an attorney shall receive, in his official capacity, any money or property belonging to his client, and shall, upon demand therefor and tender of fees, refuse or neglect to pay over the same, any person interested may apply to the supreme court for a rule requiring such attorney to show cause why his name should not be stricken from the roll of attorneys; and if at the trial the truth of the charges made be sustained, the court shall cause the name of such attorney to be stricken accordingly. After service of the rule in this case, as required by law, respondent paid the money wrongfully withheld; also the costs of this proceeding. It seems to have been understood that the proceeding would then be dismissed by relator, as respondent made no answer, took no steps to defend against the charge, and departed from the State. We decline to discharge the rule, and have heard the evidence touching the matters averred in the petition.

It seems to have been assumed in the present and several similar cases recently brought in this court that the statute mentioned was framed to aid clients in collecting moneys thus wrongfully withheld by their attorneys. Doubtless the proceeding will tend to accomplish this purpose for two reasons: First, an attorney must be lost to all sense of honor as well as professional pride, who would not thereby be stimulated to relieve himself from the odium attaching to his breach of trust; and, second, payment of the money, even though under an influence akin to coercion, would probably have some bearing upon the decision of this court on the question of disbarment. But we do not conceive that the statute referred to was adopted for the purpose of affording an additional private remedy for the collection of the moneys mentioned. In our opinion the principal object of the legislature was to place in the hands of this court an additional means whereby the profession may be purged of unworthy members, and litigants generally be protected from impositions practiced by such persons. As supporting this view, it may be suggested that without the statute at common law the client possessed quite as effective a remedy for the wrong under consideration; he might obtain from the court a rule requiring the attorney to pay over the moneys kept back, and upon disobedience of the rule the proper practice was not to move for disbarment, but to procure an attachment for the contempt. Weeks, Attys. Law, § 97. Under this common-law proceeding, as declared by Hallett, C. J., the "attorney so attached might purge himself by satisfying the demand; but the statute is otherwise." The learned judge further says:

"By section 7 it is provided that the judgment of the court shall stand until the court shall authorize the attorney again to subscribe the roll; and I do not perceive that he may obtain such permission by payment of the money merely." Concurring opinion *In re* Brown, 2 Colo., 558.

The evidence taken in the case before us demonstrates that respondent is guilty of the offense referred to in the statute, and charged by the petition. We think that he improperly neglected and refused to pay over the money of his client, the relator herein. Interpreting the statute as we do, it therefore becomes our duty to pronounce the judgment of disbarment.

In so far as the foregoing views may conflict with those of the majority of the court in the case mentioned, (2 Colo., 553,) that decision is modified. The rule to show cause heretofore issued herein is made absolute; and it is accordingly adjudged that the name of respondent, John V. Ryalls, be stricken from the roll of attorneys who are permitted to practice in the courts of this State.

## WEEKLY DIGEST OF RECENT CASES.



1. APPEAL—[*Chancery Practice*]—*Effect of Appeal on Interlocutory Decrees.*—1. An appeal from a final decree by a party entitled to appeal therefrom, brings with it for review all the preceding interlocutory decrees out of which any of the errors complained of in such final decree have arisen. An appeal may be taken from an interlocutory order overruling a demurrer, by which the principles of the cause are adjudicated, but not until after a decree has been entered carrying those principles into effect. If, however, in such case, the appellant complains not only of the error committed in such interlocutory order, but also of errors in the subsequent decrees, independent of those resulting merely from giving effect to such erroneous order, he can not appeal from such order, unless he is also in a condition to appeal from such subsequent decree. *Steenrod v. Railroad Co.*, S. C. W. Va., Nov. 22, 1884.

2. —— —— *Appeal from Decree pro Confesso does not Lie.*—Where a defendant in a chancery suit appears and demurs to the bill, and his demurrer is overruled, and a rule is given him to answer, which he fails to do, and thereafter a decree is entered in the cause granting the relief prayed for in the bill, and such defendant obtains an appeal to this court from said decree without having moved in the court, which rendered it, to have the errors complained of corrected, and assigns and complains of errors in said decree other than those resulting from the overruling of his demurrer. It was *held* that this is a decree on a bill taken for confessed; and this court will not entertain the appeal, but will dismiss the same as having been improvidently awarded. *Ibid.*

3. ——. ——. *From Order Overruling Motion to Dissolve Injunction.*—Under § 2, Ch. 178, Code 1873, an appeal lies from an order overruling a motion to dissolve an injunction, when that order is a practical adjudication of the principles of the cause. *Kahn v. Kerngood*, S. C. of App. Va., March 19, 1885; 9 Va. L. J. 369.

4. ——. ——. *Value in Controversy, in Suit in Equity to Set Aside Fraudulent Conveyance.*—Deed from H. to K., conveying property recited therein to be worth $1,500, is assailed as fraudulent by a creditor of H. whose debt is less than $500. Upon appeal by K., it is *held*, 1. As between K. and the assailing creditor, the matter in controversy is not the latter's debt, but the value of the property. 2. In absence of proof to the contrary, the recited value of the property must be treated as the real value. *Ibid.*

5. ASSIGNMENT FOR CREDITORS — [*Fraudulent Conveyances*]—*Withholding Part of the Debtor's Property Renders Deed Void.*—The primary object of the statute of Colorado relative to assignments (§ 68, Gen. St.) is to secure a *pro rata* distribution of the insolvent debtor's entire estate among all the creditors; and the withholding of part of the property from the control of the assignee, and the subsequent conveyance or mortgage of the same to favored creditors, works a fraud as palpable as would a preference given and received on the eve of an assignment for the express purpose of evading the statute. *Campbell v. Colorado Coal & Iron Co.*, S. C. Colo., June 17, 1885; 7 Pac. Repr. 291.

6. CONTRACT—[*Privity*]—*Right of Third Person to Sue upon.*—Where A sells land to B in consideration that he will pay A's debts, A cannot, after the creditors have accepted, release B from liability on the promise. The creditors have a lien on the land, and one may sue on the promise without joining the other creditors. *Dodge's Adm'r v. Moss*, Ky. Ct. App., Oct. 25, 1884; 6 Ky. Law Repr. 707.

7. CRIMINAL LAW — *Concealed Weapon — What Amounts to a Concealment.*—A partial concealment of a dangerous weapon, is a violation of the statute prohibiting carrying concealed weapons. It should be fully exposed. A pistol half sunk in the pocket or about the clothes, even though a part of it may be visible, is a concealed weapon within the meaning and intent of the statute. The word "concealed" has a statutory sense contradistinguished from its ordinary meaning, and must be construed so as to give potential effect to the law. *State v. Bias*, S. C. La., March 16, 1885.

8. —— [*Forgery*]—*Description of Statutory Offense in Indictment.*—1. Any fraudulent making or alteration of any writing mentioned in the statute, or writing included in the terms therein used, constitutes the crime of forgery. 2. It is not necessary to set out in the indictment, the particular acts that constitute the crime, but is sufficient to charge that the defendant did feloniously forge a certain cheque. 3. The charge that the defendant forged a cheque, or bill of exchange, is not vicious for duplicity. A cheque may be described in an indictment for forgery as a cheque or bill of exchange. The object of the statute in permitting the forged instrument to be described by its ordinary designation was to exclude the need of designating it by its exact legal name. *State v. Maas*, S. C. La., New Orleans, March 30, 1885.

9. DAMAGES—[*Wealth of Defendant.*]—*Evidence of Pecuniary Circumstances of Defendant, when Admissible.*—On the trial of an action of trespass for an assault and battery, the plaintiff may give in evidence the pecuniary circumstances of the defendant, to enhance his damages, and in such case the defendant may give counter evidence on the subject; but unless such evidence is given by the plaintiff, the defendant has no right to introduce proof on that subject, even in mitigation of damages. [In the opinion of the court, Mulkey, J., said: The only point made by plaintiffs in error, which we deem of sufficient importance to notice, is one relating to the admissibility of evidence. On the trial, the plaintiffs in error offered to show, by way of mitigation of damages, the pecuniary circumstances of McHugh, no evidence of that character having been offered by the plaintiff. On objection by the plaintiff, the court held the evidence improper, and excluded it from the jury, and the defendants excepted. Counsel for plaintiffs in error maintain that the ruling of the court upon the admissibility of the evidence offered is erroneous, and in support of the position cite McNamara v. King, 2 Gilm. 432, and 1 Sutherland on Damages, page 745. The citation from Sutherland seems to be in point, but none of the authorities cited in support of the text sustain it, except the case of Johnson v. Smith, 64 Maine, 553. In all the other cases cited the evidence was offered by the plaintiff, and not by the defendant, except in one or two cases, where the record fails to show how the question arose; and the case just cited, which does sustain the text, seems not to have been concurred in by a full bench. Evidence of this character, even when offered by the plaintiff for the purpose of enhancing the damages, is held inadmissible by many courts and text writers of high standing, but, nevertheless, we have recognized the contrary rule, and have no disposition to depart from it; but under the present state of authorities we are not inclined to extend the rule beyond its present limits. Where a plaintiff entitled to vindictive damages offers no evidence of the defendant's wealth with a view of enhancing them, he in effect says, "I ask no damages against the defendant except as a mere individual, without any regard to his property or estate, whether it be much or little,"—and in that kind of a case the jury have no right to give any more damages than they would if it had affirmatively appeared the defendant was without pecuniary resources. But where the testimony is offered by the plaintiff, he does it for the purpose of enhancing the damages. By offering it, he in effect says, "I ask in the way of damages something more than I would be entitled to recover from the defendant as a mere individual, without regard to his pecuniary circumstances." In doing this, the plaintiff tenders a new issue of fact, which opens up the question to both sides. The McNamara case, *supra*, like many others that might be cited, simply supports the proposition that in an action like this the plaintiff may, if he sees proper to do so, offer such testimony,—and that case was cited by this court with approval in Chicago v. Martin, 49 Ill. 241, Peters v. Lake, 66 id. 206, White v. Murtland, 71 id. 250, and Drohn v. Brewer, 77 id. 280; but in none of those cases, nor in others we have been able to

find in this court, is the right of a defendant recognized to offer evidence of this character as an independent defense, and not by way of rebuttal. To us there seems a manifest impropriety in it, and we cannot, therefore, yield our assent to it."] *Mullin v. Spangenberg*, 112 Ill. 140, (Advance Sheets.)

10. DEDICATION — [*Highway*] — *Thirty or Forty Years Use does not Establish Dedication.*—The dedication of property to the public must appear by evidence so conclusive as to exclude all idea of private ownership. So where a road has been used by the public for thirty or forty years, by the mere sufferance or tolerance of the owners of the land which it traverses, such use does not of itself establish a dedication and divest the title of such owners. *Torres v. Falgoust*,, S. C. La., March 16, 1885.

11. INFANT.—[*Ratification.*]—*Giving a Receipt, after Majority, for the Value of Property Received by him Amounts to a Ratification of his Contract.*—A ward may, after he becomes of age, disaffirm a contract which he made, while an infant, with his guardian, without restoring, or offering to restore, the property which he purchased and received under the contract; but where, after majority, and without fraud or undue influence, such ward executes to his guardian a receipt for the value of the property received by him, such an act is a valid ratification of the contract, even if such ward was ignorant of the fact that he had a right to disaffirm. [Disapproving Fetrow v. Wiseman, 40 Ind. 148.] *Clark v. Van Court*, S. C. of Ind., April 23, 1885.

12. MALICIOUS PROSECUTIONS.—[*Evidence.*]—*Evidence of Information Received Before and After the Prosecution.*—In an action for malicious prosecution evidence of information received before preferring the charge, by the person who institutes a prosecution for a criminal offense, and tending to establish the guilt of the person prosecuted, is competent as to the question of probable cause; but evidence of information received after the charge has been preferred is not. *Pennsylvania Co. v. Weddle*, S. C. of Ind., Jan. 28, 1885.

13. ———. PROVINCE OF COURT AND JURY.—[*Instructions*]—*Hypothetical Statement to be Given.*—In such case if the facts are not disputed, the court must decide as matter of law, whether they constitute probable cause; but where the facts are disputed, the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law thereon, leaving to the jury to determine the existence or non-existence of the facts. *Ibid.*

14. MASTER AND SERVANT.—[*Negligence.*]—*When Non-Resident Master Liable for Servant's Injuries.*—Where a non-resident corporation entrusts to a superior resident officer, or agent, the duty of superintending the machinery of its factory and of managing its business, it is responsible to a servant who suffers an injury from unsafe or defective machinery upon which the servant is employed, under the control and direction of such officer or agent. [Elliott, J., in the opinion says: "It is clear upon principle that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty; nor are the authorities wanting." Citing Whart. Neg. 232; Mullen v. Philadelphia Co., 78 Pa. St. 25; Gunter v. Graniteville Co., 18 S. C. 262; Crispin v. Babbitt, 81 N. Y. 516; Brothers v. Cartter, 52 Mo. 372.] *Indiana Car Co. v. Parker*, S. C. of Ind., April 28, 1885.

15. ———. ———. *Duty to Caution Inexperienced Servant in Dangerous Employment.*—It is the duty of the master not to expose an inexperienced servant to a dangerous service without giving him warning, or such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent. *Atlas Engine Works v. Randall*, S. C. of Ind., March 11, 1885.

16. ———. ———. *Liability of Master when he Delegates Duties to a Servant as Agent.*—If the master subjects the servant to the command of another, without information or caution with respect to such obligations as the master's owes, the other stands in the master's place, notwithstanding the two servants are, as regards the common employment, fellow-servants. *Aliter*, if he defines the duty and authority of each with respect to the other, or gives instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding it. *Ibid.*

17. MUNICIPAL CORPORATIONS. — [*Nuisance*] — *Wooden Buildings, when Removable.*—A wooden building is not in itself a nuisance, but it may become so when it endangers surrounding buildings, and a municipal corporation may enact an ordinance providing for the summary removal of such a building. [Elliott, J., in the opinion says "there is some conflict in the authorities as to whether a municipal corporation possesses the inherent power to prohibit the erection of wooden buildings within prescribed limits, and to cause their removal." Citing, 1 Dill. Munic. Corp., 3d ed., § 405; Brady v. Northwestern Ins. Co., 11 Mich. 425; Wadleigh v. Gilman, 12 Me. 403; Mayor, etc. v. Hoffman, 29 La. Ann. 651; Fields v. Stokley, 99 Pa. St. 306.] *Baumgartner v. Hasty*, S. C. of Ind., March 13, 1885.

18. PARENT AND CHILD. [*Contract — Consideration—Privity.*]—*Father's Agreement to Support Illegitimate Child Enforceable by Child.* — An agreement between the father and mother of an illegitimate child, that, in consideration of the surrender by the mother of all right to its custody, the father will support and educate it, is founded on a good consideration, and is enforceable by the child. [In giving the opinion of the court, Pryor, J., said: "The common law afforded no remedy against the father for the support of his illegitimate offspring; but where such a relation exists, there is a strong natural and moral obligation on the part of the father to contribute to the illegitimate child's support, although such considerations may not be sufficient to support a mere promise to pay either money or property in discharge of this moral duty, when the mother surrenders to the putative father the custody of the child on an express promise that he will support and maintain it, such a contract should be enforced. It must be conceded that the father can be made to respond in such a case by reason of his contract alone, and that such a contract must be based on some other consideration than the mere natural obligation

resting on him to support his offspring, and recognizing this as the rule we are satisfied the consideration alleged, if established, authorizes a recovery. The statute of this State enables the mother to compel the father to maintain his illegitimate child, and while this statute should be regarded more for the purpose of indemnifying the State against the demands of such helpless infants for support, it nevertheless relieves the mother from the burden and compels the father to discharge a plain duty. A promise to pay for the support of the child in the event the father will not be coerced into payment by reason of the statute has been enforced by this court not only for what would be deemed a reasonable sum, but for a much larger amount. In the case of Clarke v. McFarland, reported in 5 Dana, 45, the mother agreed with the father in consideration of her promise to forbear to proceed against him under the statute, he would from time to time make such auxiliary contributions in money as might be necessary for her support, and at the same time agreed that he would secure and pay to the mother for the child whenever requested the sum of ten thousand dollars. This court held that the promise was binding, and that the apparent extravagance of the promise would not authorize the court to say that it was not legally binding. The facts alleged in this case are all to be taken as true, and the father's promise to educate and maintain his own child and give to it money and property amounting to three or four thousand dollars in the event he is permitted to have its custody, is not such an inadequate consideration as will imply fraud or bad faith on the parts of those presenting the claim, and if the mere forbearance to coerce the father into payment is a sufficient consideration, the separation of the child from the mother and transferring the care and custody to the father is not only a sufficient consideration for the promise, but is that character of contract the value of which cannot be well estimated by dollars and cents. Here the child was actually delivered to the father, taken to his home, the latter assuming the legal responsibility of the support and education of the only object of his affection, and promising the mother in behalf of the infant, in consideration of the surrender of her claims, to give to the child a certain specified sum of money and a home of the value of $2,700. What higher or greater consideration could the mother have surrendered or given than the right to the care and custody of her child? The child should not be punished by reason of the crime of its parents, or the courts of law and equity closed against such contracts, that when clearly established, are based upon the plainest principles of natural justice. The contract is therefore binding on the father." *Benge v. Hiatt's Admr.*, Ky. Ct. of App., March 14, 1885; 6 Ky. L. J. 714.

19. PARTITION.—[*Co-Tenancy.*]—*Not a Matter of Discretion, but a Matter of Right.*—Where a case is fairly brought within the law authorizing a partition, the right to partition is imperative, and absolutely binding upon courts of equity. They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it, and yet commit no error. To invoke this equitable remedy is a matter of right and not of mere grace. ["The material question," says Mr. Justice Mulkey, in giving the opinion of the court, so far as the case in hand is concerned, is, is this right to partition imperative and absolutely binding upon courts of equity where a case is fairly brought within the law authorizing a partition, or are courts of equity clothed with such discretion that, under a given state of facts, they may grant the relief, or refuse it, and yet commit no error, or, differently put, when they may grant the relief without committing an error, are they bound to do it? That they are so bound we think is fully shown by the general current of authorities. Freeman, in his work on Co-tenancy and Partition, § 424, in discussing this question says: "It is now certain that unless, when the titles of the respective parties are spread before a court of equity, it can see that there are legal objections to the complainant's title, he can demand, as a matter of right, that it proceed with the partition." No question is made as to the sufficiency of appellant's title in this case. In Smith v. Smith, 10 Paige, 470, it is declared that partition is as much a matter of right in equity as it is at common law. In 5 Wait's Actions and Defenses, the author lays down the rule in these words: "Tenants in common have an absolute right to a division of the land held in common, notwithstanding inconveniences may thereby result to the other tenants, or if partition cannot be made, to a sale, and division of the proceeds,"—citing many authorities in support of it. Bispham, one of the most polished and accurate of modern law writers, in discussing this subject, in his work on Equity, 2d ed., p. 532, holds this language: "This jurisdiction was assumed some time about the reign of Elizabeth, and became so well established, both in England and the United States, that to invoke this equitable remedy has become a matter of right, and not of mere grace." In support of the text numerous authorities are cited which fully sustain it. See, also, to the same effect, 2 Leading Cases in Equity, pt. 1, p. 906, *et seq.* In Howey v. Goings, 13 Ill. 95, this court cite with approval the following language held by the court in Parker v. Gerard, Amb. 236, namely: "That such a bill" (being a bill in equity for partition) "is a matter of right, and there is no instance of not succeeding in it, but where there is not proof of title in plaintiff." It will be thus seen that this court at an early day placed itself in line with the general current of authority on this question, in strong and emphatic terms. Notwithstanding the rule as stated is almost universally conceded, nevertheless there are certain well recognized modifications of it. For instance, if an estate should be devised or otherwise conveyed to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others; and where the title of the complainant is doubtful — or, in other words, where he does not show a clear right to partition—it will not be awarded. So where several persons had purchased land, with a view of selling it out into lots for building ground, according to a certain plan, and it was agreed among them that neither of them should dispose of his share except in a certain manner, it was held, in a suit by the representatives of one of the parties against the survivors, that the agreement barred the right to partition. Peck v. Cardwell, 2 Beav. 137. See, also, in this connection, Cubbage v. Franklin, 62 Mo. 364; Selden v. Vermilya, 2 Sandf. (N. Y.) 568. The principle which seems to underlie all these cases is,

that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel." *Hill v. Reno*, 112 Ill. 154 (adv. sheets).

20. REPLEVIN.—[*Aider by Verdict.*]—*Omission to allege place from which Goods taken Cured by Verdict.*—In an action of replevin, the failure to allege in the complaint the place from which the property was taken, is cured by verdict. [In the opinion of the court Lord, J., said: "Originally the action of replevin lay only for goods distrained, and as the right of distress, which the action was intended to contest, was at common law local, this would seem to furnish the reason for holding the action to be local. However this may be, there can he little doubt but that the action of replevin at common law was treated as local, and that the action had to be brought in the country where the property was seized and located. Williams v. Welch, 5 Wend. 290; Atkinson v. Holcomb, 4 Cow. 45; Robinson v. Mead, 7 Mass. 353; 1 Chit. Pl. *185. The place was material and traversable, and if it be omitted the defendant may demur. Walton v. Kersop, 2 Wils. 354. But the omission to state the place in the declaration where the property was seized and located, may be cured by verdict. Gardner v. Humphrey, 10 Johns. 54; 2 Chit. Pl. *843, and note *h*. If the defendant pleaded *non cepit*, and the plaintiff cannot prove a caption, or that the defendant had the cattle, etc., in the place stated in his declaration, he will be nonsuited. 2 Chit Pl. *843, and note *h*. This is in conformity with the general principle as stated, that "a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict." Proff. Jury, § 419. The omission, therefore, to allege the place where the property was seized and located, was cured or supplied after verdict and judgment, when the defendant pleaded over without making any objection."] *Kirk v. Matlock*, S. C. Oreg., June 8, 1885; 7 Pac. Rep. 322.

21. SERVITUDES.—[*Water.*]—*Right to take and use Water.—Entry on Subjected Estate.*—1. Contracts establishing servitudes are designed to confer rights and impose obligations, which otherwise would have no existence, and should be strictly construed. 2. In the absence of express or implied stipulations the rights and obligations of the parties thereunder must be construed and regulated by the laws relative to like servitudes. 3. Under a contract creating a predial servitude in favor of one estate on another, both being sugar plantations, whereby the owner of the former acquires the right to use a canal or acqueduct running through the latter, so as to get water from a lake or swamp, the owner of the encumbe red property has no right to obstruct the flow of the water by the erection of dams or to divert it by excavations below the level of the bottom of the canal unless in cases of necessity for self-protection against injury which would otherwise result, or for purposes of great utility, and then only for a time and with due regard to concurrent rights to the water. 4. Neither can such owner, in the absence of express provision in the contract, discharge into such canal the skimmings or refuse of the sugarhouse on his land, where at the time of the agreement and for years before, such refuse was bridged over such canal and disgorged over across it to pursue a further course. Emptying such filth into the aqueduct would not only impede the flow of the water, but also pollute the water, so as to render the use of it not only of no advantage, but make it dangerous in [supplying the boilers on the favored estate, which, in consequence of the adulteration would be exposed to deterioration and explosion. 5. The owner of the creditor estate has no right to enter upon the subjected one and put up buildings and machinery, unless where it is indispensably necessary for the enjoyment of the right to get and conduct water through the aqueduct. *Shaffer v. State National Bank*, S. C. of La., March 16, 1885.

22. SPECIFIC PERFORMANCE—[*Adoption.*]—*Performance of Contract to Make a Child One's Heir.*—The specific performance of a contract in equity is not a matter of right in the party seeking it, but a matter of sound discretion in the court, which may grant or deny relief as may appear equitable under all the facts and circumstances of the case. A contract which is not certain, or which is not fair and just in all its provisions, will not be specifically enforced in a court of equity. Where an attempt is made to effect a distribution of property different from that provided by law by a contract resting in parol, or to establish by parol evidence, as where it is lost or destroyed, the evidence relied upon should be looked upon with jealousy and weighed in the most scrupulous manner. The only significance of a contract to adopt one as an heir or to give him a child's part, being to secure a right to property, is too uncertain as to the amount of property to be reached by it to be specifically enforced in equity against the heirs of the party making the same. A contract by a party having at the time an estate of the value of $20,000 and a wife living, but no children, to take, maintain and educate an orphan girl eleven years old, and for her services until she should attain the age of eighteen, leave and give her at his death, a child's part of his estate, is not based upon a sufficiently adequate consideration and can not be regarded as so fair and just and certain as to be specificaly enforced. *Woods v. Evans*, S. C. Ill., Mt. Vernon, Feb. 5, 1885.

23. STATUTE OF FRAUDS—[*Parol Agreements to Convey Land*]—*Compensation for Refusing to Perform such Agreement when Consideration has Passed.*—Where one verbally agrees to convey land in consideration that another will do some act, which he does (though no action can be brought to enforce the verbal promise,) yet, if the party can't be restored to his original condition prior to the contract, compensation may be recovered for the performance of his part of the contract, to be measured ordinarily by the value of the land. [It was alleged that the plaintiff's mother, being an unmarried woman, and the plaintiff the natural son of the intestate, the latter being desirous of having the custody of his child that he might raise and educate him according to his own wishes, and the child being at the time about three years of age, and living with and in the mother's custody, "the said decedent came to plaintiff's mother and proposed to and contracted and agreed with her as the mother and legal custodian of the child, that if she would surrender the plaintiff to him (the in-

testate) and permit him to have the raising, care and custody of plaintiff during the period of plaintiff's minority, in consideration thereof the decedent would take plaintiff, clothe, protect, maintain and educate him according to decedent's pecuniary ability, and in addition thereto, would give him $1,000 in money and the tract of land on which the intestate then lived of the value of $2,700. In giving the opinion of the court, Pryor, J., said: "The agreement on the part of the mother had been fully performed, The infant was in the custody of the father, under a contract that had never been rescinded, and while the promise to convey the land could not be enforced because not in writing, and for the additional reason as alleged that it had been sold by the heirs, its equivalent in value can be given, not as the measure of damages for failing to convey the land, but as constituting in fact the standard of value agreed on by the father for the relinquishment or surrender by the mother: and so of the $1,000 agreed to be paid as alleged. The mother cannot be deprived of the child and no damages awarded or compensation made, because the consideration agreed to be paid was not in writing. [He referred to Berry v. Graddy, 1 Met. (Ky.) 602, as supporting this doctrine.] *Benge v. Hyatt's Adm'r.*, Ky. Ct. of App., March 14, 1885; 6 Ky. L. J. 714.

24. TAXATION — [*Constitutional Law.*] — *Statute Exempting Board of Trade from Taxation Unconstitutional.*—The Board of Trade of a particular city, in disseminating commercial information and regulating business in that city, does not thereby render any public service to the State, and an act exempting it from State taxation is unconstitutional, for the reason (1) it confers an exclusive privilege not in consideration of public services, and (2) it takes the property of one citizen and gives it to another. [Judge Pryor dissents and holds the services rendered by the Board of Trade are of a public character, and the exempting act is not unconstitutional, and can not be so held upon the complaint of the tax-collecting officer, the State having reserved the right to repeal the exempting act and not having done so]. *Barbour v. Louisville Board of Trade*, Ky. Ct. of App., April 23, 1885; 6 Ky. L. Repr. 769.

25. TORTS.—[*Justice of the Peace.*]—*Suit against Justice of the Peace for Damages.*—A petition claiming damages against a justice of the peace which charges that the magistrate rendered a judgment beyond the scope of his authority or jurisdiction, based on malicious and oppressive motives, is not amenable to the exception of no cause of action. *Estopival v. Peyroux*, Sup. Ct. of La., New Orleans, May 18, 1885.

26. WARRANTY—[*Judicial Sale*]—*Right of Purchaser at Foreclosure Sale.*—A purchaser at a judicial sale to foreclose a conventional mortgage, has the right to call the seizing creditor in warranty to defend a suit, the object of which is to evict him. Such purchaser is entitled to restitution of the price paid; first, from the seized debtor, and next, for deficiency, from the seizing creditor, where the sale is annulled. *Citizen's Bank v. Freitag*, S. C. La., March 16, 1885.

## QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

### QUERIES.

3. To what extent does an abstract of title filed by the plaintiff under an order of court, in an action of ejectment or to quiet title, limit him in his proof?

M.

4. A post nuptial agreement is made by B in favor of his wife and certain real estate conveyed to her pursuant thereto, in accordance with § 2504, Revised Stat. Ind. 1881. She took posssession of the jointure thus provided. Long before the husband's decease she, joining with her husband, conveyed the real estate named in the post-nuptial conveyance, for value, and the proceeds thus realized was used in common by husband and wife. No divorce or separation ever occurred. Husband since deceased. Is the post-nuptial provision yet in force, and such as to bar the widow from taking under the law? Would she be required to treat the provision thus made as still in force and elect as to how she will take, under the law or under the post-nuptial agreement? Would the subsequent conveyance by husband and wife not be deemed a revocation of the post-nuptial contract? § 2502 id, declares that such jointures take effect at the death of the husband.

B.

5. A recovers a judgment against B in one State, and afterwards brings suit upon it in another State. In the meantime, B takes an appeal from the judgment sued upon, which operates a suspension of the judgment. Can he then plead *nun tiel* record to the action pending on the same in the second State, and have the transcript of the appeal inspected thereunder by the court, as being a part of the record upon which the action is brought?

Wheeling, W. Va. M. T. FRAME.

### QUERIES ANSWERED.

*Query No. 6.* [20 C. L. J. 99]. A woman owning land in fee simple, married. Children were born of this marriage. The husband, solvent at time of marriage, became insolvent in course of time. Suits were brought on his debts by creditors and judgment had. During the months intervening between the bringing of suit, and the obtaining judgment, husband and wife went into Chancery, and, on petition, her realty was settled on her as a *feme sole* free from debts, liabilities and control, etc., and with power of disposition by deed, will, or otherwise. The wife devised the land to her children and died. The creditors of the husband levied on what they supposed was the life estate of the husband, as tenant by the courtesy. The devisees enjoined the sale, by bill filed for that purpose, and to remove the cloud of the levy from their title. Whose is the better right, creditors, devisees, or children? Land is situated in Tennessee; all the occurrences took place in that State, and it is the domicil of all parties. Answer fully, and give authorities and reasons.

THERLMORE.

Answered in the affirmative by Tremmell v. Klibold 75 Mo. 255, and numerous authorities cited. See also 76 Mo. 23.

M.

*Another Answer.*—We think the devisees have the better right, for the following reasons: By virtue of the marriage, the husband became entitled to a life-estate as tenant by the curtesy, which might have

been subject to his debts, provided a lien had been obtained against it, prior to the settlement made by chancery on the wife, with his consent, free from his debts, liabilities and control. This settlement, we think, terminated his interest in the property, and vested same in the wife, and the wife being empowered to dispose of the property by deed, will or otherwise, and having made a will disposing of same to her children, it would seem they would be clearly entitled.

Camden, S. C. W. H. R. WORKMAN.

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*Query 1.* [21 C. L. J. 17.] A applied to B for a loan of money, B being a broker who made loans and rediscounted them at C bank in New York City, and when short of funds made loans direct to C bank, and bank paid face of loan, and three per cent. commission to B. B made out negotiable note to C bank, and A signed same, but before delivery A learned that he did not need the money and looked for note, but it was, as he supposed, mislaid, but in fact was stolen by B. B sent note to C bank, and obtained face value of same, and three per cent. commission. Subsequently C bank sold note, before due, to D, for full value. Neither C bank or D had any notice of facts until note became due. Query: 1. Can A get out of note when sued by D by proof of above facts? 2. If A pleads above facts does the plea amount to a denial of the execution of note, so as to put the burden of proof of execution and delivery on D, the plea being sworn to? 3. Can D rest his case on proof of his *bona fides*, and purchase for value before due? The querist has examined Parsons Notes & Bills, Daniel Nego. Instruments, Edward's on Bills, Chalmer's Digest, and Michigan, Illinois, Wisconsin and New York cases, but want some additional corroborating authority on both sides of question, as he wants to get at the law and collect this note. D'S ATTORNEY.

*Answer.*—1. No. "The reason is that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country, and in order that this may not be impeded, it is necessary that innocent purchasers for value should have a right to enforce payment of them against those who, by making them, have caused them to be apparently a part of such currency." Ingram v. Primrose, 28 L. J. C. P., 294; 1 Sm. L. C., 597, and note to Miller v. Race; 2 Green Ev. § 171; Powers v. Ball, 27 Vt., 662; Wheeler v. Guild, 20 Pick., 545; 10 Cushing, 488; Price v. Phœnix Co., 17 Minn; Swift v. Tyson, 16 Pet., 16; Goodman v. Simonds, 20 How., 365. 2. No. The fact that there had been no delivery by or on behalf of defendant, is "an infirmity of title" cured by transfer to *bona fide* purchaser for value. Price v. Phœnix Co., *supra*, and cases therein cited. It was held in Gill v. Cubitt, 3 Barn. & Cr., 466, that such a plea would "throw upon the plaintiff the burden of proving that he is a holder *bona fide* and for valuable consideration. Note to Miller v. Race, *supra*. This doctrine was "shaken off" in Goodman v. Harvey, 4 Ad. and Ellis, 870, which latter case is the well-settled doctrine in this country. "The burden of proof lies on the person who assails the right claimed by the party in possession." See Murray v. Lardner, 2 Wall. 120; Hotchkiss v. Nat'l Bank, 21 Wall. 359; 12 Otto, 442. *E contra*, in Burson v. Huntington, 21 Mich. 415, it was held that an undelivered note was not a contract, and a thief could not, by stealing it, make it one. The learned judge (Christiancy) seemed to lose sight of the policy of the law in its hardship. 3. The affirmative follows logically from the above cases. T. D. C.

Arkadelphia, Ark.

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*Query No. 2.*—[21 C. L. J. 17.] In 1870, a father made a division of his estate among his children, and placed each one in possession of his allottment—had deeds drawn up calling for metes and bounds, but did not sign and deliver then. Two years thereafter, on his death-bed, he sent for a neighbor who had aided him in making the division. The deceased remarked his neighbor when he came: "The deeds I have had prepared are not finished up, and they are over at W's (one of his sons). He was at the time very feeble, but possessed of all his faculties, and his neighbor, says conscious of the near approach of dissolution. He was asked by one of the witnesses to the instrument if they were drawn as he intended them. He replied: "Yes, Mr. B I think drew them as I directed him." He then signed the papers, and they were witnessed as required in this State under the statute of wills. After signing he was asked by his neighbor what he (the latter) was to do with them. He replied: "Hand them to their owners." One of the grantees remarked: "Not now; let Mr. M (the neighbor) hold them, and if you never call for them he will then deliver them to us;" or, "Let Mr. M hold them for us, and if you never call for them," etc., to which the grantor replied: "Well, well." The grantor died in a day or two, and the papers were delivered to their owners. Was there a sufficient delivery as a deed? If not, will the instrument, if probated, take effect as a testamentary disposition? S.

Marion, N. C.

*Answer*: — The deeds drawn in favor of the children, which were neither signed nor delivered, were incomplete, and therefore passed no title. The question to be considered is, whether when said deeds were signed by the father, the grantor, and delivered to a third person, was a sufficient delivery to pass title. At first sight there is a question whether this transaction is a present delivery, or an escrow. After an examination of the law and various authorities we are inclined to hold that it was a present grant, and passed the legal title to the grantees. Whether the placing a deed in the hands of a third person is a present delivery or an escrow, depends upon the intention of the parties. If the delivery depends upon the performance of a condition it is an escrow, otherwise it is a present grant, though it be to wait the happening of an event. If the deed is to be delivered at the grantor's death it is a present deed. Washburn on Real Property, vol. 3, p. 269. The deeds in this case were given to a neighbor to be delivered to the grantees upon the death of the grantor, thereby creating a present grant, to take effect upon the happening of a certain event, the death of said grantor. A deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker, and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the meantime have deceased. Wood Conv., 193; Com. Dig. Tait. a 3; Hatch v. Hatch, 9 Mass. 307; Hulick v. Tevil, 4 Gilm. 176; Buffum v. Green, 5 N. H. 91; Morrison v. Kelly, 22 Ills. 626; Foster v. Mansfield, 3 Met. 412. Thus in Hatch v. Hatch, 9 Mass. 307, and in Foster v. Mansfield, 4 Met. 412, a father made a deed to his son, and placed it in the hands of a stranger to be delivered to the grantee. And this was held to be a good deed, although the original delivery was not regarded as an escrow. The cases of Belder v. Carter, 4 Day, 66, and Doe v. Knight, 5 B. & C., 671, involve the same principle. LEWIS P. CLOVER.

Springfield, Ill.

ANOTHER ANSWER.—It is common learning that one of the prerequisites to the validity of a deed is

delivery, since it takes effect only from delivery. 4 Kent. Com, 454, (Star page); 3 Washburn on Real Property, 254; 2 Humph. (Tenn.) 597. No formal, manual ceremonious delivery is required (for the instrument might even remain, after its delivery, in the grantor's hands. 4 Kent. Com. 455; 3 Wash. Real Prop. 264); but there should be evidence of delivery—that the grantor regarded signing and acknowledging as completing all required of him to effect delivery. 5 Humph. 349; 10 Mass. 456; 3 Metc. 275. The signing, sealing and acknowledging will suffice if no condition is annexed and if nothing further remains to be done. 5 Humph. 411; 2 Cold. 520; 3 Tenn. Ch. 40. Delivery is complete when the grantor parts with his dominion over the thing granted intending it shall vest in the grantee; provided this is done no especial form of words is necessary. 1 Sneed 191; 1 Head 574; 2 Cold. 402 and 520; 3 Tenn. Ch. 547. And delivery need not be to the grantee in person but may be to a third person, for him. 4 Kent. Com. 455; 3 Wash. Real Prop. 255, 259; 2 Cold. 402. Whether the instrument in question is a deed or a will must be determined from the intention of the parties as gathered from the language. 10 Yerg. 320; 2 Swan, 654; 2 Head, 564; 4 Baxter, 357. Keeping these principles inview, I conceive the instruments in question to be deeds—all the necessary formalities having been observed as shown in the statement of facts. That they are deeds is, I think, the correct conclusion unless there remain some questions of North Carolina Statute law concerning seals or number of witnesses required, etc., not set forth. The querist will derive most important assistance from the article of W. W. Thornton, Esq., on "Deeds of a Testamentary Character," 19 Cent. L. J. 46, and from the article on "Necessity for Proof of Manual Delivery of Deeds when Dispensed With," 20 Cent. L. J. 44, by Thos. W. Peirce, Esq.

FLOURNOY RIVERS.

Pulaska, Tenn.

## JETSAM AND FLOTSAM.

CONTRACTS BY TELEPHONE LEGAL.—The Kentucky Supreme Court has just decided that a contract made by telephone is valid and can be sustained in court. It has been supposed heretofore that the difficulty in sustaining an agreement made between parties miles apart would arise from the want of proof that the parties who did the talking over the wire were the persons they represented themselves to be. In the cases decided the operator at one end of the line did the talking for the principal and reported the conversation in the hearing of witnesses, whose testimony the court admitted on the ground that the operator acted the part of an interpreter. The same question is in dispute in some other States, but Kentucky is the first to furnish a judicial decision upon it. As precedents are apt to be followed in law it is quite possible that the Kentucky decision may be accepted by the courts of other States. Louisville *Courier-Journal*.

EMOTIONAL INSANITY.—It has been solemnly decided by the Medico-Legal Society of New York, after a thorough investigation, that Yseult Dudley is insane, to the extent that she is "liable to be carried away by her feelings, even while aware at the same time that she is doing that which is wrong." This species of insanity is so common that a very large share of the time of the courts is taken up with the consideration of cases in which it plays a conspicuous part. In fact, but for such an order of brain disease, we might dispense with most of our jails and penitentiaries. St. Louis *Globe-Democrat*.

CHIVALRY.—So far as the *Banner-Watchman* is concerned, we will state that we have never seen Mrs. Compton, and write only such facts as were given by her husband and the oldest citizens of Athens. If Mrs. Compton wishes to make any statement or correction, our columns are open to her. Several parties who investigated the matter were under the impression that Mrs. Compton herself had put in the posion until that lady's denial of the fact, which, of course, was sufficient. Athens (Ga.) *Banner*.

DECREASE OF CRIME IN ENGLAND.—With reference to the decrease of crime, which has been so much noticed by the judges at the recent assizes, the following figures taken from the Judicial Statistics may be useful, as showing the number of persons for trial during the last twenty years: 1864, 19,506; 1865, 18,614; 1866, 18,849; 1867, 18,971; 1868, 20,091; 1869, 19,318; 1870, 17,578; 1871, 16,269; 1872, 14, 801; 1873, 14,893; 1874, 15,195; 1875, 14,714; 1876, 16,078; 1877, 15,890; 1878, 16,372; 1879, 16,388; 1880, 14,770; 1881, 14,786; 1882, 15,260; 1883, 14,659. The number of these persons who were acquitted and discharged averaged a little over twenty-three per cent.

SITTING IN DHARNA.—Last week, in a case tried before Mr. Justice Mathew, a letter written by the plaintiff to the defendant was put in evidence, in which the plaintiff threatened to commit suicide unless the defendant paid the debt. Learned men have found traces of the practice of sitting in *dharna* in many communities dwelling far apart, and have deduced from that fact a common origin. But the instance proved in the Royal Courts shows that the conclusion drawn by Maine and other great writers is fallacious. It is part of our common humanity to work upon our fellowmen by exhibiting the evil which will fall upon ourselves if they fail to do their duty towards us, or it may be to show mercy to us. Probably the best account of sitting in *dharna* is to be found in Mr. Nelson's work on 'Hindu Law.' The learned judge says at p. 165: The recognized mode of compelling a debtor to pay up appears to have been by sending a Braham to the *dharna* (is this our '*dun*'?) before his house, with a dagger or a bowl of poison, to be used by the Braham on his own body if the debtor proved obstinate. When the tax-collector gave too much trouble, a ryot would sometimes erect a *koor*, or pile of wood, and burn an old woman on it by way of bringing sin on the head of his tormentor. The *lex talionis* obtained in the following shape. Persons who consider themselves aggrieved by acts of their enemies would kill their own wives and children, in order, as we may suppose, to compel their enemies to do a similar act to their own hurt. Thus two Brahmans cut off their mother's head to spite a foe. And it seems that upon being punished by loss of caste, out of defence to the feelings of the British Government, these simple-minded men expressed the greatest surprise, since they had acted, so they said, through ignorance. On one occasion five women were put to death together for witchcraft, after being regularly tried for the offense, according to custom, by the heads of their caste. With regard to the *lex talionis*, a letter is preserved in Recueil X. of the *Letters cur. et ed.*, written by Father Martin in 1709, in which he describes the horrible practice in vogue amongst the inhabitants of the Maravа country, of killing or wounding oneself, or one's wife or child, in order to compel one's enemy to go and do likewise. Such a practice can obtain only where no legal means exist of obtaining reparation for wrongs suffered. It would be

very interesting to know to what extent this natural law has prevailed, in various forms, in South India, and whether its influence has yet altogether died out. The practice of *dharna* would seem to be nothing more than a threat of instantly resorting to the *lex talionis*. And I take it that Marco Polo was mistaken in his view of the meaning of a creditor drawing a circle round his debtor, by way of arresting him, when he said that a debtor who breaks such arrest 'is punished with death as a transgressor against right and justice,' and that he (Marco Polo) had seen the King himself so arrested and compelled to pay a debt. Doubtless the King was coerced by the threat, expressed or implied that the creditor would kill or wound himself, if not satisfied, in which case the King would have been bound to kill or wound himself in return. Father Bouchet, in the letter cited above, tells us that obstinate debtors were arrested in their houses by their creditors in the name of the Prince, under pain of being declared rebels, and when so arrested durst not pass out until bystanders had interceded and made the creditors come to terms. The use of the name of the Prince I regard as imaginary, and opposed to native ideas. What coerced the debtor probably was the fear of his creditor injuring himself. And possibly it is this fear that often operates on the minds of native servants of the present day when they decline to go on a long journey with their masters without first partially satisfying their creditors. And where, as so often happens, an old man or women is killed by his or her own party in a boundary riot, probably in most instances the object of the slayers is to bring sin on their opponents.

THE STAR CHAMBER AND THE COURT OF HIGH COMMISSION.—The courts of the Star Chamber and High Commission were tribunals unknown to the common law of the land, exercising a jurisdiction quite incompatible with the existence of liberty, and apt to become the means of all sorts of oppression. It would take too much space to examine the whole history of these courts. With regard to the former of them, the Star Chamber, much ignorance prevails, and advantage has been taken to throw a sentimental and false color upon its actions, with a view to making it an element in the composition of historical romances. It will be sufficient to say that it was a court composed of the king himself, and such members of his privy council as he chose to summon; that it took cognizance of certain offenses not then noticed as such by the ordinary law courts, such as libel and slander, and also assumed a right to take any case it chose from the consideration of the regular courts of law, and especially the criminal courts, and deprived a man in this way of the right of trial by his peers, which had been secured for him by Magna Charta. The lords of the council were at once judges and jury, even in cases where the Crown was concerned; there was not any appeal from their decision, and the sentences of the court were often most ruinous (notwithstanding the clause of the Great Charter which forbade any man to be fined to such an extent as would prevent his getting a livelihood), even where they did not condemn a man to imprisonment, and sometimes to torture. Any punishment short of death—and many of the punishments came only just short of it—the court of Star Chamber asserted its power to inflict: and the claim having been put forward in action at a time when men were not able to question it, came at length to be looked on almost as a matter of course, except by those who suffered by it, and by those faithful guardians of the liberties of England who only bided their time to announce that the court itself was an illegal thing, and ought to be abolished. The High Commission was a tribunal invented under Queen Elizabeth, a sort of ecclesiastical Star Chamber, composed of ecclesiastics, who made it their business to "sniff out moral taints," and to persecute any one who worshipped God in any other way than that perscribed by the Church of England. It was armed with power to fine and imprison, and this power it used till resistance became so strong, even under Elizabeth, that it was deemed prudent to admonish it from above.—From *Cassell's Popular Educator* for May.

ORAL ARGUMENT.—In an address before the Pittsburgh Bar Association on the rights and duties of the bench and bar, S. A. McClung, Esq., said: It seems to me that a judge must have little tact, if he cannot even if he is elevated to the bench without possessing much learning, with the aid of a bar properly managed and encouraged succeed in administering the duties of his high office in a learned and dignified manner, and acquiring an enviable reputation as a judge. Beyond this, the judge must so act as to secure the hearty and industrious co-operation of his bar or the interests of justice suffer. No one who is fit to sit upon the bench will for a moment pretend that he knows so much that it is impossible for him to receive light from any lawyer who will study his case. It is impossible for any judge to decide his cases properly without the aid of the bar. I have no confidence in cases of any difficulty whatever, decided without full argument, nay, more, I have no confidence in cases decided without full *oral* argument. Those courts which are bringing into vogue the practice of dispensing with oral argument are, in my opinion, doing it at the expense of the destruction of a noble profession and the ultimate irremediable injury of the science of the law. There is, there can be, no substitute for oral argument."

* * * * But no lawyer will prepare himself for an oral argument unless he has reasonable assurance that he will be listened to patiently and courteously when he comes into court. Doubtless lawyers will often talk uselessly, but better that, than that they should not talk at all, and thereby the interests of justice should suffer. A court should be not only a place where cases are argued, but a school where lawyers are trained to make arguments. Hence, arguments within reason, when prepared, should be listened to whether made by lawyers young or old. Young lawyers who are fresh from the study of foundation principles and who have industriously studied a case, are by no means to be despised when heads are put together for the purpose of arriving at the true decision, and besides those who are now young lawyers are ne day to do the important work of our courts. I would most respectfully submit to the judges before whom they practice, whether they are doing their duty if they fail to patiently hear their causes, not only for the sake of the men and the causes themselves, but also for the sake of the training for future work which is thus afforded."

GIVE YOUR STREET AND NUMBER.—In writing a letter to which your expect an answer, if you live in a city which has a free post-office delivery, always give your street and number. Do not forget this because you happen to write on a postal card. If Edward McGill, Esq., of New York City, will send us the street and number to which he wishes this journal sent in exchange for the *District Court Record and Court Journal*, it will be done.